No. 83-85

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EASTERN FOODS, INCORPORATED,
Petitioner,

vs.

R. C. McENTIRE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

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There are two pivotal points in this case. One deals with the injection of a separate and distinct legal theory into the case, and the other deals with the jury charge associated with that theory.[1]

[1] Petitioner argues that the theory of transferee liability was not stated in the complaint. Respondent cites a paragraph in its brief to support its argument that, although stated under a different theory, was nonetheless sufficient notice of Respondent's claim of transferee liability or *de facto* merger. The trial court record (pertinent portions cited in Petitioner's brief) reveals that the actual charge to the jury was a mixture, consisting of all the various ways in which a successor corporation could be responsible for the debts of a transferor. In actuality, the jury could have found that (a) there was an express or implied assumption of liability, (b) the transaction amounted to a consolidation or a merger, (c) the transaction was fraudulent, (d) that some of the elements of a purchaser in good faith were absent, or (e) that the transferee corporation was a continuation of the old one. This, of course, presupposes that Petitioner received B & B's assets. The record overwhelmingly shows that Petitioner lost a substantial amount of money in its dealings with B & B.

Petitioner's argument is that, to the extent transferee liability entered the case, it did so via Rule 15(b). Even if it is conceded that Respondent's Complaint was sufficient to give adequate notice of such a theory, Petitioner takes the position that the jury charge was grossly inadequate in this regard. Further, Petitioner argues that the Fourth Circuit committed a serious and highly prejudicial error when it acquiesced in Respondent's argument that a merger had occurred. This, in turn, led to the inevitable disagreement over the proper measure of damages.

I. Respondent's Complaint was Predicated Upon Breach of Contract Accompanied by Fraudulent Act and Common-Law Fraud; Rule 15(b) Provides the Only Rationale for the Subsequent Jury Charge on Transferee Liability.

Respondent argues that is is not necessary to reach the Rule 15(b) issue, since Respondent's original complaint gave sufficient notice under Rule 8. However, Respondent's complaint stated causes of action based on breach of contract accompanied by fraudulent act and common-law fraud. An examination of the paragraph cited by Respondent in its brief reveals that the term "merger" is nowhere to be found. On the contrary, the word "buy-out" is used:

> That the Defendant, Eastern Foods, took all of the assets of B & B Produce Processors, Inc., and hired the services of Dick Bowers and other B & B employees to work for it, and thereafter, after all benefits of the *buy-out* of B & B had gone to Eastern Foods, the Defendant stopped making all payments to the Plaintiff, the last payment being made at the end of November, 1978. (Emphasis added).

Clearly, "buy-out" refers to a purchase and sales transaction and not to a merger. Therefore, to the extent an

additional theory came into the case, it entered through the rather broad doors of Rule 15(b).[2]

II. Respondent's Contention That the Jury Could Have Found That Eastern Independently Obligated Itself to Answer for B & B's Indebtedness to McEntire is Totally Inconsistent With the Instructions Give To the Jury and Non-responsive to Petitioner's Argument that the Totality of the Jury Instructions Were Violative of Petitioner's Right to Due Process of Law.

Respondent takes the position that an independent contractual relationship arose between McEntire and Eastern, whereby Eastern agreed to answer for the indebtedness of B & B. In order to find an independent basis in contract, as Respondent claims the jury could have done, the jury would have had to totally ignore the following essential instruction:

> In order to find for the plaintiff, you must find that the defendant made the promise to pay the debt as claimed by the plaintiff to withdraw the complaint filed with the United States Department of Agriculture. *Even if you find that the defendant made the promise to pay the debt, you must find for the defendant unless you also find that the defendant asked the petitioner to withdraw his complaint.* The mere fact that the plaintiff withdrew his complaint is not sufficient to entitle him to recover damages from the defendant. (Emphasis added).

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[2] Petitioner's key point, as noted previously, is that the Complaint did not state a cause of action based on de facto merger or transferee liability. A charge of transferee liability was given to the jury, and as noted at page 20 of Petitioner's brief, the total charge included the phrase: "Or the transaction amounts to a consolidation or merger". This is one of several factual scenarios that the jury *could* have found. However, neither the verdict nor the actual judgment support Respondent's contention that a merger in fact occurred.

In apparent recognition of this point, Respondent refers to a letter written to the U.S.D.A. by an officer of B & B Produce Processors, Inc. However, this does not represent a request *on behalf of Eastern* to McEntire, asking McEntire to withdraw his informal complaint. At best, Respondent can only find support in the record for "half a loaf" since the jury was specifically instructed that not only must McEntire withdraw his complaint, but such withdrawal must be at the specific request of Eastern. That McEntire withdrew a complaint or decided not to pursue some right he may have had is meaningless unless Eastern *bargained* for such a consideration. There is simply no basis in the record to prove that Eastern asked McEntire to withdraw a complaint. Petitioner raised this point to the Fourth Circuit, but the Opinion does not indicate a consideration of this particular aspect.[3]

The focal point of inquiry, however, centers on the totality of the instructions to the jury. As petitioner has previously argued, it is the mixture of instructions and the manner in which the jury proceeded to reach a verdict that underscores a violation of the due process clause, and an aberration of Rule 51. The taint engendered thereby is not lessened by a piece-meal severance of the jury instructions and a retrospective, self-fulfilling analysis thereof.

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[3] The presumption seems to have been that Dick Bowers, President of B & B Produce Processors, Inc., signed the letter in question after it had been written by K. L. Abbott, an officer of Eastern Foods. This is contrary to the record, but even if accepted at face value, it is still irrelevent to the issue of whether Eastern requested McEntire to withdraw his complaint. Certainly, the U.S.D.A. was not McEntire's agent.

III. The Question of Damages is Ordinarily a Matter of State Substantive Law; However, the Charge Given to the Jury in This Case Transcends Fundamental Safeguards of Rule 51 and Constitutes an Inordinate Violation of Due Process of Law.

Respondent continues to perceive the vital question relative to damages as essentially one of distinction between an acquisition by purchase and an acquisition by merger. It is this distinction that has served, in large measure, to obscure the true legal issues inherent in this case.

The discursiveness of Respondent's logic is readily demonstrated by raising certain obvious questions. First of all, given that a portion of the relevant charge to the jury was stated thusly:

> Now, the transferee of assets—that's the person who received the assets from another—is not under ordinary circumstances liable for the debts of the person from whom he received those assets. However, there are exceptions to this rule. These exceptions are if they are an expressed or implied assumption of liability. Or the transaction amounts to a consolidation or a merger. Or the transaction is fraudulent. Or some of the elements of a purchaser in good faith were absent. Or the transferee corporation is a mere continuation or reincarnation of the old, transferor corporation. . . ,

is it proper to conclusively presume that the jury opted for that portion of the charge which stated:

> . . . Or the transaction amounts to a consolidation or merger . . . ?

Furthermore, if as respondent contends, sufficient notice of a claim of merger was stated in the original complaint, why is it that the jury received an ubiquitous

charge on transferee liability? Given that Respondent actually used the term "buy-out" in its original complaint, not merger or consolidation, what is it that supports the argument that the nexus between the theory of relief stated in the complaint and the return of a general verdict by the jury conclusively demonstrates that Eastern effectuated a merger with B & B?

Again, it is Eastern's contention that the seeds of manifest prejudice were sown within the instructions that were given to the jury. Expressed by way of another question: Is an aggrieved party entitled to single out one portion of a related jury charge and thereby attach to it a measure of recovery that is indisputably not available with the other portion. This allows a party, in a case such as this, to pick and choose one of several results that a jury could have found, obviously selecting the one that affords the greatest recovery. This is not due process of law by any stretch of the imagination and it is overwhelmingly repugnant to the most basic notions of fundamental fairness.

Even if there were some way to ascertain that the jury found that a merger-in-fact occurred, petitioner still disagrees with Respondent's position because no instructions were given that the jury could apply to determine whether a merger occurred. That the terms "merger" or "consolidation" were never explained to the jury is readily apparent from the record. Equally important, though, is Respondent's examination of the law.

Respondent continues to neglect crucial distinctions between a *de jure* and a *de facto* merger. Where a *de jure* or statutory merger has been effectuated, most jurisdictions provide that the surviving entity assumes all of the liabilities of the nonsurviving entity. This is not the proper

measure of damages under *de facto* merger or transferee liability.

In this regard, Respondent has cited respected authorities in support of its position that the proper measure of damages must take into account all liabilities of a transferring entity. Yet, the same authorities make a crucial distinction. In 19 Am.Jur. Section 1559, the rule is stated as follows:

> Assuming that a corporation succeeding to the assets of another corporation may be held liable for obligations of the latter, the extent to which liability exists against the successor corporation has been variously stated. It is sometimes said that liability is limited to the amount of property received. *This is particularly true in case of an absorption of the property of the debtor corporation—in other words, a merger in fact.* (Emphasis added).

An equally distinguished treatise states as follows:

> Where there is no consolidation or merger, liability, is any, resulting from the acquisition by one company of the assets and business of another, is not primary; *it is limited to the value of the assets received*, or the value of a portion thereof to which creditors of the transferring corporation were entitled to look for the payment of their claims, and it accrues only after the creditors have exhausted their remedies against the corporations with which they contracted. 1630 C.J.S. 1403. (Emphasis added).

Finally, in 15 A.L.R. 1104, the annotator states:

> Where there is an absorption of the business and assets—in other words, a merger de facto—either by a corporation formed for the purpose, or by one already in business, the liability of the corporation receiving the assets is, where it exists, based upon the so-called "trust-fund doctrine", on the grounds that such receiving corporation does not stand as a

> bona fide purchaser for value. In such case the extent of the liability is necessarily determined by the value of the property received.

The controversy over the measure of damages endures because it was accepted, ipso facto, that the jury reached the conclusion that a merger occurred. It is this initial presumption and its consequences that underscore Petitioner's concern. Again, even a cursory reading of the original complaint reveals that Respondent used the term "buy-out" not merger; and a review of the jury instructions shows that the jury could have found that a purchase for an inadequate consideration occurred as opposed to a merger. Respondent readily admits that the case of *Beckroge v. South Carolina Power Company*, 197 S.C. 184, 15 S.E.2d 124, 149 A.L.R., 779 (1941), applies to "purchase" transactions, but not to *de facto* merger situations. Also, Respondent contends that the trust-fund theory has no application in regard to a *de facto* merger. Yet, the annotation noted above states that a merger *de facto* and a purchase for less than adequate consideration are both within the purview of the "trust-fund" doctrine.

CONCLUSION

Petitioner strongly asserts that it has been denied due process of law in this case. This denial manifests itself by subtle, yet deleterious, violations of accepted parameters associated with Rules 15(b) and 51 of the Federal Rules of Civil Procedure. Further, Petitioner believes that this Court's powers of supervision are invoked due to the Fourth Circuit's acquiescence in an interpretation of law which is at all odds with the substantive law of the State of South Carolina.

Respectfully submitted,

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